(3)

MAR 4 - 2005

No. 04-1039

In The
Supreme Court of the United States

RANDALL INDUSTRIES, INC., and
RANDALL RENTS OF INDIANA,

Petitioners,

v.

CHRISTOPHER PEASE, VINCE VITI,
WILLARD BERGE and MIKE GEAR,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
Seventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

HELEN L. MORGAN*
1125 17th Street NW
Washington, DC 20036
202/778-2684
202/778-2641 (fax)

DALE D. PIERSON
ALEXIA M. KULWIEC
Local 150 Legal Department
INTERNATIONAL UNION OF
OPERATING ENGINEERS
Local 150, AFL-CIO
6140 Joliet Road
Countryside, IL 60525
708/579-6663
708/588-1647 (fax)
*Attorneys for Respondents
Christopher Pease, Vince Viti,
Willard Berge and Mike Gear*

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether Petitioners have provided this Court with any compelling reason for review?
2. Whether the Seventh Circuit denied Petitioners due process?
3. Whether the Seventh Circuit properly denied Petitioners' Motion for Reconsideration?

PARTIES BELOW

The parties in the proceeding before the United States Court of Appeals for the Seventh Circuit were Appellants Christopher Pease, Vince Viti, Willard Berge and Michael Gear, and Appellees Randall Industries, Inc., Randall Rents of Indiana, and Production Workers Union of Chicago and Vicinity Local 707.[1]

[1] Contrary to Petitioners' contention, the Seventh Circuit did not find that the International Union of Operating Engineers, Local 150, AFL-CIO is "in effect a part to the appeal" (Petitioners' Brief at ii, n. 1). Rather, appellants were simply aided in the litigation by counsel for Local 150. *Pease v. Production Workers Local 707*, 386 F.3d 819, 821 (7th Cir. 2004).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
ARGUMENT	3
I. PETITIONERS HAVE FAILED TO PRESENT A COMPELLING REASON FOR REVIEW	3
II. THE SEVENTH CIRCUIT DID NOT DENY PETITIONERS DUE PROCESS	5
A. Petitioners Misinterpreted the Language of Rule 38 of the Federal Rules of Appellate Procedure	5
B. The 1994 Amendments Indicate that Petitioners' Interpretation Is Wrong	6
C. The Seventh Circuit Did Not Deny Petitioners Due Process	7
III. PETITIONERS FAILED TO DEMONSTRATE WHY THIS COURT SHOULD OVERTURN THE SEVENTH CIRCUIT ORDER DENYING PETITIONERS' RULE 59 MOTION FOR RECONSIDERATION	10
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Brown v. Keene, 33 U.S. 112 (1834) 4

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 4

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 4

Guthrie National Bank v. Guthrie, 173 U.S. 528 (1899) 9

Heckers v. Fowler, 69 U.S. 123 (1864) 4

Hernandez v. Joliet Police Department, 197 F.3d 256 (7th Cir. 1999) 7, 9

Kaplan v. Zenner, 956 F.2d 149 (7th Cir. 1992) 8

L.B. Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263 (7th Cir. 1995) 10

Link v. Wabash R. Co., 370 U.S. 626 (1962) 4

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 9

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 9

Monroe v. Children's Home Association of Illinois, 128 F.3d 591 (7th Cir. 1997) 7

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 9

Northlake Marketing & Supply Inc. v. Glaverbel, 194 F.R.D. 633 (N.D. Ill. 2000) 8

Oto v. Metropolitan Life Ins. Co., 224 F.3d 601 (7th Cir. 2000) 10

TABLE OF AUTHORITIES – Continued

Page

Pease v. Production Workers Local 707, 386 F.3d 819 (7th Cir. 2004) ii

Ross v. Moffitt, 417 U.S. 600 (1974) 4

Stookey v. Teller Training Distributors, Inc., 9 F.3d 631 (7th Cir. 1993) 6

Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) 7, 8

RULES

Fed. R. App. P. 38 ..... 1, 2, 5, 6, 7

Sup. Ct. R. 10 ..... 3, 11

OTHER AUTHORITIES

H. W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press, 1991) 3

Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949) *in* 69 S. Ct. at v, vi 3

JURISDICTION

Respondents agree that Petitioners' Statement of Jurisdiction is correct.

STATUTORY PROVISIONS

Respondents agree with Petitioners' citation to Fed. R. App. P. 38. Rule 38 provides:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Respondents do not agree that the Fifth Amendment of the United States Constitution should play any part in this appeal.

STATEMENT OF THE CASE

On September 20, 2002, Respondents Pease, Viti, Berge and Gear sued Petitioners Randall Industries, Inc., Randall Rents of Indiana ("Randall"), and Production Workers Union of Chicago and Vicinity Local 707 ("Local 707"), for breach of the collective bargaining agreement between Randall and Local 707 and breach of the union's duty of fair representation – commonly referred to as a "hybrid §301/fair representation claim."

On November 7, 2003, the United States District Court denied Petitioners' Motion for Summary Judgment as to the claims filed by Respondents Pease, Berge and

Gear and granted summary judgment with respect to Viti (Petitioners' Appendix at G-31). Accordingly, the case proceeded to trial before the United States District Court for the Northern District of Illinois. On January 15, 2004, the jury found in favor of Respondent Willard Berge and against Randall and Local 707 (Petitioners' Appendix at F-1); the jury also found in favor of Randall and Local 707 and against Pease and Gear (Petitioners' Appendix at F-2).

On March 12, 2004, the District Court granted Petitioners' motion for judgment as a matter of law (Petitioners' Appendix at F-23). On April 9, 2004, Respondents filed their timely appeal. On October 15, 2004, the United States Court of Appeals for the Seventh Circuit issued its opinion, which it amended on October 25, 2004 (Petitioners' Appendix at C-1 – C-8). Only after the Seventh Circuit's Decision on the merits of the appeal did Petitioners file their Motion for Sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure (Petitioners' Appendix at A-1).[2] On November 2, 2004, the Court of Appeals for the Seventh Circuit denied Petitioners' Motion for Sanctions as untimely (Petitioners' Appendix at A-1).

[2] Petitioners sought sanctions in the form of both attorneys' fees and additional costs (Petitioners' Brief at 4). Rule 38, of course, only provides for sanction of "damages and single or double costs." Fed. R. App. P. 38.

ARGUMENT

I. PETITIONERS HAVE FAILED TO PRESENT A COMPELLING REASON FOR REVIEW

The Supreme Court of the United States will only grant a petition for a writ of certiorari for compelling reasons. Sup. Ct. R. 10. This Court will grant certiorari where there are conflicting decisions in the United States Court of Appeals on the same *important matter*; where a court of appeals has departed or sanctioned the departure from the accepted and usual course of judicial proceedings; where a state court of last resort has issued a decision conflicting with another state court of last resort or with a United States court of appeals; or a state court or United States court of appeals has decided an important question of federal law that should be decided by this Court. Sup. Ct. R. 10 (emphasis added); H. W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press, 1991). Review will be granted only in cases presenting "tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country." Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949) *in* 69 S. Ct. at v, vi. Petitioners have not and cannot demonstrate that their Petition presents any of these compelling reasons.

This Court only considers differing decisions of the United States court of appeals which are "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10. Here, Petitioners merely allege a split in the Court of Appeals on a procedural matter, the timing of motions for sanctions. The

timing of a motion for appellate sanctions is hardly a matter requiring national uniformity. *Cf. DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 171 (1983) (need for uniformity in limitations periods applied to hybrid §301/fair representation claims supports adoption of six-month period found in §10(b) of National Labor Relations Act). Such a rule should be left to the appellate courts. The Supreme Court has historically defended the right of courts to enact and interpret their own rules of procedure. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Heckers v. Fowler*, 69 U.S. 123, 128 (1864); *Brown v. Keene*, 33 U.S. 112, 114 (1834). Indeed, this Court has vested in the lower courts the right to manage their affairs so as to achieve the orderly and expeditious disposition of cases. *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962). Accordingly, this Court need not treat differing procedural rules among the United States courts of appeals as a split in the circuits that warrants review.

Furthermore, Petitioners fail to identify any additional compelling reasons recognized in Rule 10 that compel review by this Court of the Seventh Circuit Order of November 2, 2004 (Petitioners' Appendix at A-1). Without any such reason, this Court should deny Petitioners' Petition for Writ of Certiorari in its entirety. In any case, even if the Supreme Court finds a decision of the Seventh Circuit to be incorrect, it may still deny certiorari. *Ross v. Moffitt*, 417 U.S. 600, 615 (1974).

II. THE SEVENTH CIRCUIT DID NOT DENY PETITIONERS DUE PROCESS

A. Petitioners Misinterpreted the Language of Rule 38 of the Federal Rules of Appellate Procedure

The plain language of Federal Rule of Appellate Procedure 38 does not require the interpretation suggested by Petitioners. Rule 38 states (Fed. R. App. P. 38):

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Nothing in the rule supports Petitioners' suggestion that only after the Court determines that an appeal is frivolous may the Court then award damages and costs to the appellee. Rather, the Court may award sanctions for a frivolous appeal *either* after it gives an appellant notice and an opportunity to respond, *or* after a motion is made by an appellee and again a response from appellant. Fed. R. App. P. 38. The Rule's "if . . . then" construction described by Petitioners simply indicates that the Court may only award sanctions *if* it concludes that an appeal is frivolous *after* affording appellants an opportunity to respond. Petitioners cite no authority to support their claim that the Court must issue a separate finding in advance of an award of sanctions. Their interpretation would create a protracted, cumbersome process not contemplated by the drafters of the Rule.

B. The 1994 Amendments Indicate that Petitioners' Interpretation Is Wrong

Petitioners are correct that Rule 38 operates differently today than prior to the 1994 amendments. Before the 1994 amendments, Rule 38 provided, "If the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Fed. R. App. P. 38 (1993). Prior to the amendments, parties simply included a request for sanctions pursuant to Rule 38 in their appellate briefs. *See, e.g.*, *Stookey v. Teller Training Distributors, Inc.*, 9 F.3d 631, 637 (7th Cir. 1993) (plaintiff moving for sanctions in brief, and defendants responding in response brief). According to the Advisory Committee note to the 1994 Amendment, "[r]equests . . . for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures."

The Advisory Committee on Amendments to Appellate Rules of Procedure was concerned that mere reference to Rule 38 sanctions in an appellate brief was not enough notice to satisfy due process. Consequently, the Committee added the specific requirement of (1) filing a separate motion for sanctions; or, (2) if the court determined to move *sua sponte*, providing adequate notice to the sanctionable party in order to afford them the due process that was overlooked when parties simply requested sanctions in their appellate briefs. Fed. R. App. P. 38 Advisory Committee's note, 1994 Amendments.

After December 1, 1994, parties could no longer simply request sanctions in appellate briefs, but needed to file a separate motion. The Rule now provides the party

opposing sanctions with two opportunities to respond to the motion for sanctions: (1) in its reply brief; and/or (2) in a separate response to the motion for sanctions. For example, in *Monroe v. Children's Home Association of Illinois*, 128 F.3d 591 (7th Cir. 1997), the appellee "filed its Rule 38 motion *contemporaneously with its brief*." 128 F.3d at 594 (emphasis added). The Court explained that "[t]his gave [the appellant] two opportunities to show that the appeal had enough substance to avoid condemnation as frivolous: a reply brief, and a response to the motion." *Id. See also Hernandez v. Joliet Police Department*, 197 F.3d 256, 265 (7th Cir. 1999) (submitting Rule 38 motion for sanctions just after submitting appellate briefs).

The same rationale applies here – if Petitioners believed that Respondents' appeal was frivolous, they would have formulated such belief shortly after receiving Respondents' brief. Petitioners should have filed their Motion for Sanctions at that time, affording Respondents the opportunity to respond to both in their appellate reply brief as well as in a separate response to the Motion.

C. The Seventh Circuit Did Not Deny Petitioners Due Process

The Seventh Circuit has clearly held that parties must file Rule 38 motions within a "reasonable period," which is defined as prior to the Court's substantive ruling on the merits of the appeal. *See Hernandez v. Joliet Police Department*, 197 F.3d 256, 265 (7th Cir. 1999) (court recognized appropriateness of submitting Rule 38 motion for sanctions just after submitting appellate briefs). The Seventh Circuit explained the "outer parameters" of the timeliness of motions for sanctions in *Szabo Food Serv., Inc. v.*

Canteen Corp., 823 F.2d 1073 (7th Cir. 1987). "[R]equests for attorney's fees should be filed within 90 days of final judgment in all events." *Northlake Marketing & Supply Inc. v. Glaverbel*, 194 F.R.D. 633, 635 (N.D. Ill. 2000) *citing Szabo*, 823 F.2d at 1080. However, compliance with the 90 day *Szabo* test "will not necessarily protect a sanctions claim if the party bringing it has failed to do so within a reasonable amount of time." *Id. quoting Kaplan v. Zenner*, 956 F.2d 149, 152 (7th Cir. 1992).

In *Northlake Marketing*, the movant brought a motion for sanctions more than nine months after judgment. *Id.* The Court criticized the movant for waiting "until after the actual disposition of the substantive appeal to bring its current motion for sanctions." *Id.* at 635. In the Seventh Circuit, if parties delay their motion for sanctions beyond the outer limits set by *Szabo*, they must "raise equitable considerations to explain such a delay" to survive dismissal. *Id.* Parties submitting a delayed motion for sanctions must offer a "persuasive argument as to why they could not have brought the motion far, far sooner." *Id.* Accordingly, the Seventh Circuit requires litigants to file any motion for sanctions before the court rules on the substantive case on appeal. Had Petitioners properly researched the issue, they would surely have found the Seventh Circuit rule.

The Seventh Circuit's rules are both fair to litigants and consistent with the goal of conserving judicial resources. If an appellee considers an appeal frivolous, it must alert the court to this issue while the entire matter is under consideration. To adopt Petitioners' rule would be to require the appellate court to consider the matter twice: first, in ruling on the merits, and then again after it has decided the case to determine whether the matter was

indeed frivolous. Moreover, as was the case here, Petitioners effectively added a second round of briefing which again required an independent review rather than one simultaneous to consideration of the substantive questions presented. Such a rule wastes the court's time and the litigants' money and should not be endorsed.

Petitioners fail to suggest how they were denied due process. While due process requires notice and an opportunity to be heard, courts have the authority to establish rules that litigants must follow to be afforded such opportunity. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 801 (1983), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 539 (1899). As demonstrated above, minimal research reveals the Seventh Circuit's requirement that a litigant file a motion for sanctions prior to the Court's ultimate ruling on the merits of the appeal. *See Hernandez*, 197 F.3d at 265. Where a litigant fails to adhere to procedural requirements, it often loses the opportunity to be heard – and the court does not deny due process in enforcing such requirements. As this Court observed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (citations omitted) (emphasis in original):

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitation . . . or, in an appropriate case, filing fees. . . . And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. . . .

Petitioners fail to provide any case law supporting their position that the Seventh Circuit denied them due process. Their argument is similarly empty and should be rejected as such.

III. PETITIONERS FAILED TO DEMONSTRATE WHY THIS COURT SHOULD OVERTURN THE SEVENTH CIRCUIT ORDER DENYING PETITIONERS' RULE 59 MOTION FOR RECONSIDERATION

Petitioners seek review of the Seventh Circuit's denial of their Motion to Reconsider or Alternatively Petition for Rehearing (Petitioners' Brief at 1). To prevail on a Rule 59 motion for reconsideration in the Seventh Circuit, the movant must present either newly discovered evidence or establish a manifest error of law or fact. *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000); *L.B. Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995). Manifest error is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto*, 224 F.3d at 606. Yet Petitioners fail to provide this Court any authority or even argument suggesting why such review is necessary. Petitioners have failed to assert or prove any manifest error nor can Petitioners demonstrate that the Court abused its discretion.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari. Petitioners have failed to identify any compelling reason for review. Petitioners' attempt to

suggest a split in the United States Court of Appeals fails to provide a compelling reason for review because differences in procedural rules are not decisions in conflict "on the same important matter" within the meaning of Sup. Ct. R. 10. Moreover, the Seventh Circuit did not fail to provide Petitioners due process but rather merely enforced timing requirements articulated in readily identifiable precedential decisions. Accordingly, Respondents respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari in its entirety.

Respectfully submitted,

HELEN L. MORGAN
Counsel of Record
1125 17th Street NW
Washington, DC 20036
202/778-2684

DALE D. PIERSON
ALEXIA M. KULWIEC
Local 150 Legal Department
INTERNATIONAL UNION OF
OPERATING ENGINEERS
Local 150, AFL-CIO
6140 Joliet Road
Countryside, IL 60525
708/579-6663

Counsel for Respondents